MM Dkt. No. 94-150

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
Broadcast Television National Ownership Rules	)	MM Docket No. 96-222
Review of the Commissions's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 96-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8
TO: The Commission	)	

MAY 11 1997

COMMENTS OF POST-NEWSWEEK STATIONS, INC.

Post-Newsweek Stations, Inc. ("PNS") commends the Commission's efforts to appropriately adjust the duopoly rule standard to the Grade A contour coupled with a Designated Market Area ("DMA") requirement. We believe, however, that permitting blanket exceptions to the Commission's long-standing and sensible duopoly rule for UHF/UHF or UHF/VHF combinations, without any required public interest showing, could greatly hinder competition and diversity in local markets. Rather than abandoning the duopoly rule, we would support a waiver policy for failing stations or allotments that otherwise would lay follow. PNS also urges the Commission to implement its proposal to treat local marketing agreements ("LMAs") involving television stations in the same manner as those between radio stations for

No. of Copies rec'd 4
List ABCDE

attribution purposes and to retain its current calculation standards for making determinations under the national aggregate audience reach cap.

As a television station group owner dedicated to the principle that diversity in local markets benefits the public interest, PNS is concerned that the trend toward consolidation of broadcast television interests both locally and nationally is endangering our system of diverse television broadcasting that is the envy of the rest of the world.[1] We take very seriously our obligation to serve the public interest by broadcasting responsibly to provide our audiences with programming that addresses the needs and interests of our communities. Our views in these proceedings are neither antediluvian nor protectionist. PNS has in the past and will continue to support deregulation of the broadcast industry, but we believe that the public interest mandates that the Commission deregulate judiciously with the public in mind and not merely for the sake of deregulating itself. Revisions of existing ownership rules should be made if and when those changes benefit the public interest, not when it benefits the expansionist ambitions of particular entities.

I. DIVERSITY IN LOCAL MARKETS REMAINS AN IMPORTANT FACTOR IN SERVING THE PUBLIC INTEREST, AND THE COMMISSION SHOULD DEREGULATE CAREFULLY TO PROTECT OUR EXCEPTIONAL SYSTEM OF BROADCASTING.

The duopoly rule has long helped to preserve our unique system of local broadcasting that is admired around the world. Future consolidation is assuredly an outcome of relaxing the duopoly rule and viewers would be the losers. The public interest suffers when diversity of voices and competition in local advertising markets is limited. Make no mistake, we

---

[1] PNS owns and operates six network affiliated television stations (WDIV in Detroit, Michigan; WFSB in Hartford, Connecticut; WJXT in Jacksonville, Florida; WPLG in Miami, Florida; KPRC-TV in Houston, Texas and KSAT-TV in San Antonio, Texas).

understand that an increasingly widespread view in the industry is "more is better."[2] Consolidation of television stations in local markets does little to advance the public interest, even though it greatly enhances a large group owner's share of the pie. Already, large group owners and networks have been able to structure nonattributable transactions affording them significant control and influence over television stations that they otherwise would be unable to own. Small players that traditionally have had more difficulty entering the industry are facing new obstacles put forth by a more consolidated industry.

In considerations involving television/radio ownership and satellite stations, PNS merely requests that the Commission remain firm in its commitment to diversity in television upon which the American system of broadcasting was built. In the process of deregulating, the Commission must ensure that localism and broadcasting in the public interest do not become relics of the past.

II. PNS APPLAUDS THE COMMISSION'S PROPOSED MODIFICATION OF THE DUOPOLY RULE TO RELAX THE PROHIBITED CONTOUR FROM THE GRADE B TO A GRADE A STANDARD, BUT ALLOWING BLANKET EXCEPTIONS TO THE RULE COULD LEAD TO UNDUE CONCENTRATION AND LOSS OF MEDIA DIVERSITY IN LOCAL COMMUNITIES.

A. We Support the Commission's Proposal to Modify the Duopoly Rule Measurement Standard.

Although the current duopoly rule was designed to foster competition among local television stations, the Grade B standard was illogical, unfair and handicapped broadcasters in

---

[2] David Smith, President of Sinclair Broadcast Group, recently acknowledged that "[i]n the long run, his plan is for Sinclair to be one of seven survivors, on par with the Big Three Networks, Rupert Murdoch's Fox, Tribune and Chris-Craft Industries." David Smith: Striking it Rich with Sinclair Broadcasting & Cable at 25 (Aug. 19, 1996). Mr. Smith, a leading proponent of LMAs, further notes that "[t]he business is consolidating. There are going to be fewer and fewer players." Id.

competition with new alliances and technologies. The Commission wisely seeks to liberalize the benchmark to the more realistic Grade A standard, tailoring the standard more rationally to the geographic area where most of a station's core audience resides.

However, behind such a move by the Commission is a belief that television stations will be permitted to benefit from economies of scale without sacrificing competition between stations in the same market. Therefore, we believe that the Commission is appropriately guarding against the erosion of competition and diversity in local markets by requiring that television stations also serve separate DMAs. DMAs reflect the actual viewing patterns and advertising markets for television stations. Relaxing the prohibited contour from Grade B to Grade A alone, without the accompanying DMA requirement, may generate anticompetitive mergers that will reduce diversity of programming in local markets.

B. An Exception to the Local Ownership Rule for UHF/UHF or UHF/VHF Combinations is Ill-Founded.

Relaxing the duopoly rule to permit joint ownership of UHF/UHF or UHF/VHF combinations would place more channels in fewer hands, endangering the Commission's long-standing goals of diversity, competition and service to local communities. There is no legitimate reason to discount UHF station ownership. As we have seen recently, many UHF stations are no longer weak stations. Numerous UHF stations have acquired major network affiliations and they, along with others, have garnered significant viewership share in their markets. Also, in today's world where the vast majority of the country is cable-covered, there is no real justification for the UHF-VHF distinction.[3]

---

[3] And in tomorrow's world where most broadcasters will operate ATV stations on UHF frequencies, there will be even less justification for using a UHF frequency as a proxy for less market power.

If the Commission allows a UHF/UHF or UHF/VHF exception to the duopoly rule, the exception would swallow the rule. Such an exception is equivalent to allowing virtually any two stations in the same market to be jointly owned. That result is directly contrary to the Commission's local ownership policy. If there is truly a need for a waiver of the rule because a failing station has a small audience share or limited area of signal coverage, the Commission could grant a waiver based on the facts of that particular case. Universal exceptions for two stations in a market as long as one is a UHF station would, in contrast, decrease the number of independent voices in those markets as well as inhibit attempts by new players to enter the market.

C. Exceptions to the Duopoly Rule Should Be Made Only in Those Particular Cases Where It would Clearly Serve the Public Interest.

The FCC should grant waivers on and *ad hoc* basis for cases where the modified duopoly rules may be more restrictive than the current standard,[4] where there are failed stations or unused frequencies or upon a showing that a waiver would serve the public interest. Currently, failed stations are those that have been dark for at least four months or involved in bankruptcy proceedings.[5] We would not oppose the Commission's development of a financial test to determine if stations have failed. Similarly, allowing same-market stations to file for a long-vacant allotment or other unused frequency would serve the Commission's goals of promoting diversity and competition in local markets by allowing more stations to go on the air in certain areas. PNS requests only that the Commission

---

[4] As the Commission has noted, in some geographically large DMAs west of the Mississippi River, the DMA may be so large that two stations could be in the same DMA and still not have overlapping Grade B contours. Second Further Notice of Proposed Rulemaking in MM Docket Nos. 91-221 and 87-8 at ¶26 (released November 7, 1996).

[5] See 47 C.F.R.§ 73.3555(c), Note. 7.

remain mindful of the need to increase viewer choice in a local market by encouraging the growth of new stations without stifling competition by concentrating ownership or control of those stations in the hands of an influential and powerful group owner.

III. THE COMMISSION SHOULD NOT ALLOW TELEVISION LMAS TO UNDERMINE OUR HISTORIC COMMITMENT TO DIVERSITY AND COMPETITION IN AMERICAN BROADCASTING.

A. If Television LMAs Must Be Allowed, They Should Be Subject to the Same Attribution Rules As Radio LMAs.

The premier tenet of broadcasting regulation in the United States is that licensees serve the public interest. Licensees can meet that obligation only if they retain control over their programming, advertising and management of their stations. LMAs can strip smaller stations of that control, granting it instead often to large group owners. Diversity of voices in local markets declines when stations that otherwise would be independently managed are controlled by other stations that likely exist in the very same market. The public interest suffers when there are fewer voices in local markets. Thus, LMAs and similar agreements[6] run counter to the very premise upon which our system of broadcasting is based.

We recognize, however, that the Commission likely will adopt rules recognizing that certain LMAs are appropriate. We ask only that those rules do not undermine diversity policy or hinder competition by newer entrants in the industry. Therefore, in the event that the Commission chooses to allow LMAs subject to the attribution requirements that now exist for

---

[6] As noted by the Commission, other agreements such as Joint Sales Agreements ("JSAs") may give one station too much control over another station's advertising shares. See Attribution Further Notice at ¶33. Aside from implicating possible antitrust concerns, LMAs and JSAs may frustrate the broader aims of the Communications Act of 1934. The antitrust laws and the Communications Act are meant to further separate, but complementary, goals. However, the Communications Act does more than just safeguard competition -- it promotes diversity of programming, station autonomy, and localism.

radio stations, PNS urges the Commission to adopt clear, understandable rules governing their use. For example, if an owner could own a particular station, it should be allowed to enter into an LMA with that station. Clearly, Congress still supports the concept of diversity in local markets. Although Congress removed caps on national ownership and had ample opportunity to abolish the local ownership rules as well, it chose not to do so.

B. The Commission Should Not Grandfather LMAs Wholesale Without Individual Public Interest Showings Because the Possibility of Harm to the Public Is Too Great.

PNS opposes any grandfathering of existing LMAs except on a case-by-case basis upon a showing that the LMA serves the public interest and then only for the length of the current LMA contract. We cannot support the Commission's grandfathering of LMAs without its examining the underlying relationships involved. Each and every LMA was entered into at the risk of the contracting parties and with the knowledge that such agreements were not explicitly endorsed by the Commission. Unfortunately, LMAs have too often been used as a contrivance to skirt the television duopoly rule. LMAs should not be vehicles to avoid compliance with the Commission's multiple ownership rules or subterfuge for efforts to undermine the Commission's long-standing cross-interest policy. Blanket grandfathering of LMAs now would only encourage further actions of evasion when parties encounter other Commission rules that they dislike. In effect, under the Commission's proposal, stations that

acted responsibly as "good citizens" when LMA activity was in its zenith would be penalized for not raiding the henhouse when the Commission's back was turned.[7]

Moreover, grandfathering existing LMAs would only prolong diminished competition in those markets, adding insult to injury. There are already at least 50 LMAs in existence, with 40 of them in the top 100 markets.[8] Those members of the viewing public in markets where LMAs are in place already have less diversity in television programming than they might otherwise have had. Under the proposed grandfathering scheme, they will receive the message that because the Commission does not want to disrupt existing business structures, they will have to wait for choice and diversity in their markets. And wait they will -- in some cases up to 10 years. Many LMAs have extraordinarily long terms.[9] The Commission should not condone and endorse former evasive behavior by sanctioning existing LMAs for any period of time. Instead, if television LMAs must be allowed, they should at the very least be subject without delay to the same attribution rules that are applicable to radio LMAs.

---

[7] As some commenters have noted "[t]he FCC allowed all these LMAs into being essentially without rules; now it faces the awkward position of turning back the clock or of legitimizing these bastard operations." Broadcasting & Cable at 98 (Jan. 27, 1997). Noting that "'[p]eople have been slipping around the rule anyway," Philip Jones of Meredith Corp. Broadcast Group recently added that relaxing duopoly restrictions would merely make people striking the LMA deals "feel less guilty.'" Id. at 4.

[8] See Broadcast & Cable at 4-5 (Jan. 27, 1997). To the extent the Commission determines that it would be in the public interest to grandfather existing LMAs, it should consider permitting other Licensees in those markets to enter into similar agreements for the same time periods. Such a scheme might help alleviate the competitive imbalance created by grandfathering of the LMAs.

[9] Of course, the Commission clearly must reject calls to permanently grandfather LMAs or to permit renewal terms to be exercised. And any grandfathering that is permitted should be terminated by any change in ownership, a policy the Commission has followed for years in connection with newspaper-broadcast, cable-broadcast and television-radio grandfathering.

IV. SEVERE MODIFICATION OF THE CALCULATION STANDARDS FOR THE AGGREGATE NATIONAL AUDIENCE REACH CAP WOULD LEAD TO GREATER MEDIA CONCENTRATION AND REDUCED COMPETITION AND COULD CLOSE THE DOOR TO OWNERSHIP OPPORTUNITIES FOR NEW PLAYERS.

Now that Congress has eliminated the national cap on the number of television stations that one entity may own and has increased the aggregate national audience reach cap to 35 percent, it is more important than ever to ensure that consolidation in the media industry does not lead to the demise of diversity and competition in markets nationwide. Huge multimedia conglomerates are scrambling to amass large numbers of television stations, driving up prices and greatly reducing the ability of new entrants to own local stations. Rather than the current television marketplace with many diverse voices, elimination of the national ownership rules, if coupled with loose calculation standards under the aggregate national audience reach cap, could leave the public with a television service composed of a few very large owners whose decisionmaking centers are concentrated in a smattering of major cities. The public interest will not be served by a handful of companies controlling the news and information that Americans receive.

The current calculation standards under the national audience reach cap promote the Commission's dual public interest goals of diversity and competition. Any modification of those standards must be done with an eye towards the impact on local stations, the local community and new entrants in the industry. For example, the 50 percent audience reach discount for UHF stations should be discontinued in the Commission's 1998 biennial ownership review (or, preferably, sooner) and an interim limit should be placed on certain

transactions to prevent injury to the viewing public as a result of the discount.[10] The loosening of the national audience cap will lessen any concerns that the UHF discount was intended to address. There simply is no valid reason for discounting UHF stations for attribution purposes.

V. CONCLUSION

For all these reasons, we request that the Commission modify the duopoly rule as currently proposed and to abandon the proposal to allow blanket exceptions to the rule so as to preserve both competition and diversity in local markets. We support the proposal to attribute certain stations involved in LMAs to their brokering stations, but we urge the Commission to refuse grandfathering of existing LMAs. Finally, we urge the Commission to vigorously enforce the aggregate national audience reach cap of 35 percent, to eliminate the 50 percent audience reach discount for UHF stations and to impose an interim limit on transactions that will harm the public interest through application of the UHF discount pending a formal rule change.

Respectfully submitted,

POST-NEWSWEEK STATIONS, INC.

By: Robert E. Branson

ROBERT E. BRANSON
3 Constitution Plaza
Hartford, CT 06103
(860) 493-6538
Vice President and Chief Legal Counsel for Post-Newsweek Stations, Inc.

February 7, 1997

---

[10] We fail to understand why this component of the rules is not dealt with in this docket. Delaying decision until 1998 simply creates another opportunity for some companies to expand ownership and then cry for grandfathering. Changing the standard now would be a much more responsible course of action.